BEEHIVE TELEPHONE CO., INC.

IBLA 84-209 Decided September 28, 1984

Appeal from decisions of the Salt Lake City District Office, Bureau of Land Management, denying application to amend and assessing fees for right-of-way grant U 51503.

Affirmed in part, reversed in part, and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Federal Land Policy and Management Act of 1976

   A decision imposing rental charges under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), for a right-of-way for a telephone line financed pursuant to the Rural Electrification Act of 1936 will be reversed on appeal to conform to the Act of May 25, 1984, P.L. 98-300, 98 Stat. 215, providing that rights-of-way shall be granted without rental fees for such facilities.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Federal Land Policy and Management Act of 1976

   Pursuant to sec. 504(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(a) (1982), the Secretary of the Interior has discretion to set the limits of a right-of-way in light of the area to be occupied by the facilities authorized thereunder, the area required for operation and maintenance of the facilities, the area required for protection of public safety, and the area required for protection of the environment against unnecessary damage. An appellant challenging the determination of boundaries for a right-of-way has the burden of showing error.

APPEARANCES: A. W. Brothers, President, Beehive Telephone Company, Inc.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Beehive Telephone Company, Inc. (Beehive), appeals from two decisions of the Salt Lake City, Utah, District Office, Bureau of Land Management (BLM),

regarding its right-of-way for a telephone line. The first decision, dated November 23, 1983, denied appellant's application to amend right-of-way U 51503. The decision dated November 29, 1983, assessed rental and reimbursement fees for the same right-of-way.

On September 20, 1983, Beehive applied for a right-of-way for an underground telephone cable through public lands located in Tooele County, Utah. The application stated that Beehive is a state-regulated utility "financed by the REA." A legend to an accompanying map stated: "The right-of-way applied for is ten (10) feet in width, being five feet on each side of the center line." Beehive's application asserted the urgent need for approval of that section of the proposed right-of-way between Clover and Terra, Utah. Pursuant to this request to expedite the application, on September 28, 1983, BLM granted the first segment of right-of-way (U 51503) for a distance of approximately 3.6 miles and a width of 10 feet. 1/ Soon thereafter, BLM calculated rental and fees for the initial segment. A notice of rental charges in the amount of $53 per annum for that section was issued on October 12, 1983. In addition, a cost reimbursement fee of $500 and a post permit fee of $200 was levied.

On November 10, 1983, Beehive filed an application with BLM to amend the 10-foot right-of-way to a 1-inch width with the objective of decreasing the annual rental fee. The request was denied by BLM because it would be impossible to install and maintain the cable within a corridor of that size. On November 29, 1983, BLM issued a further decision regarding rental for the right-of-way. This decision advised that the regulations at 43 CFR Subpart 2800 require payment annually, in advance, of the fair market rental value of the right-of-way. Accordingly, after allowing credit for a prepaid rental deposit of $25, the decision demanded payment of a balance of $35 for the first year's rental.

It appears from the record that the rental charge was computed at the same rate per acre ($12) as the earlier notice of rental on October 12, 1983, but that the total was amended to reflect the additional segment considered by BLM to be added to the right-of-way as of November 18, 1983. See note 1 supra. The document setting forth the rental valuation consisted of a memorandum from the Realty Specialist to the District Manager. The memorandum stated, in part, that: "Applying current policies for establishing rental charges, the following calculations show the lump sum rental value for the term of the grant." The annual rental was determined by multiplying the number of acres (5) by a value of $12 per acre to arrive at an annual rate of $60.

1/ The grant was issued for a linear path across the following public lands: Secs. 29, 30, and 31, T. 5 S., R. 6 W.; sec. 35, T. 5 S., R. 7 W.; sec. 3, T. 6 S., R. 7 W., Salt Lake Meridian. It appears from a written confirmation of telephone conversation dated Nov. 18, 1983, appearing in the file that the right-of-way was considered to be amended as of that date to include additional public land along the right-of-way route not previously included. The amendment added a 0.5-mile segment through sec. 34, T. 5 S., R. 6 W., Salt Lake Meridian.

In its statement of reasons, Beehive complains that the right-of-way grant for a 10-foot width was arbitrary and does not accurately reflect its desire for passage of a 1/2-inch cable, 2-1/2 feet underground in a right-of-way corridor already dedicated to several existing rights-of-way. It argues that since the Department lacks published widths for rights-of-way, BLM cannot refuse its application for the width requested. Further, Beehive asserts that rights-of-way were previously granted for a flat, minimal fee for each 5-year period and that the rental assessment for U 51503 is predicated upon some recent, obscure dictate which lacks supporting law. In addition, Beehive has demanded a hearing where it can question the people involved in the decisionmaking process.

Prior to the enactment of Title V the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1982), the Department operated under different authority for granting rights-of-way over public lands and employed different methods for assessing rental fees. Subchapter V of FLPMA repealed and replaced most existing statutes authorizing right-of-way grants and provides:

> The Secretary, with respect to public lands [,] * * * [is] authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for-
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> * * * * * * * *
>
> (5) systems for transmission or reception of radio, television, telephone, telegraph, and other electronic signals and other means of communication[.]

43 U.S.C. § 1761(a) (1982).

Regarding rental payments and reimbursement of costs for rights-of-way, section 504(g) of Title V provides:

> The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way. * * * The Secretary concerned may, by regulation * * *, require an applicant for or holder of a right-of-way to reimburse the United States for all reasonable administrative and other costs incurred in processing an application for such right-of-way and in inspection and monitoring of construction, operation, and termination of the facility * * *.

43 U.S.C. § 1764(g) (1982). Each applicant for a linear right-of-way is required under 43 CFR 2803.1-1(a) to submit fees for reimbursement of administrative costs according to the specified schedule. For each linear right-of-way application 5 to 20 miles in length, $500 is required. After the right-of-way grant is issued, the holder thereof is obligated under 43 CFR 2803.1-1(b) to transmit a nonreturnable payment to reimburse costs incurred in monitoring activities on the right-of-way. The holder of a linear right-of-way 5 to 20 miles long is required to pay $200. Under 43 CFR 2803.1-2, the holder of a right-of-way grant shall pay annually, in advance, the fair market rental value as determined by the authorized officer. Such fee is predicated on the fair market value of the rights authorized in the grant.

[1] Subsequent to issuance of the decision appealed from establishing the rental charge for the subject right-of-way, Congress amended section 504(g) of FLPMA to provide that rights-of-way shall be "granted, issued, or renewed, without rental fees, for electric or telephone facilities financed pursuant to the Rural Electrification Act of 1936, as amended, or any extensions from such facilities." Act of May 25, 1984, P.L. 98-300, 98 Stat. 215. 2/ In light of the change in statutory authority, the decision is reversed to the extent it charges the appellant, a utility financed pursuant to the Rural Electrification Act (REA), rental for the telephone right-of-way after May 25, 1984. La Plata Electric Association, 82 IBLA 159 (1984). 3/ Although imposition of a charge for the fair market value was authorized prior to May 25, 1984, the calculation of the rental charge in this case bears a marked similarity to that rejected by the Board in A. Keith Barben, 81 IBLA 332 (1984). Rental was charged at a rate of $12 per acre for the area embraced in the right-of-way. The record contains no appraisal of the fair market value of the right-of-way grant as required by regulation. 43 CFR 2803.1-2(a). Accordingly, on remand, rental for the period prior to May 25, 1984, should be calculated either on the basis of an appraisal or the minimum fee of $25 provided by regulation. 43 CFR 2803.1-2(a).

That part of the decision appealed from assessing charges for reimbursement of administrative and other costs is affirmed as being in accordance with the statutory and regulatory requirements. Appellant has shown no error in this regard.

[2] Beehive also asserts error in BLM's denial of its application to amend the granted right-of-way to a 1-inch width. Beehive's objective in seeking reduction of the right-of-way width is to proportionally reduce the rental fees. It argues that it does not need a 5-foot clearance on each side of the cable since access is provided by existing rights-of-way, which include a paved public road. Although this issue is largely mooted from appellant's viewpoint by elimination of the rental charge, the question merits brief discussion. 4/

2/ The terms of this amendment explicitly restated the authority of the Secretary to require reimbursement of reasonable administrative and other costs. 98 Stat. 215.

3/ In La Plata Electric Association, supra, we applied the statutory amendment and reversed BLM's decision to charge La Plata, an REA cooperative, fair market value for an electric transmission line. Although we did not expressly so state, we believe that REA cooperatives remain liable for fair market value payments up until May 25, 1984. It is only from that day forward that they are entitled to free use. Thus, where BLM has granted an FLPMA right-of-way to an REA cooperative prior to May 25, 1984, BLM may assess fair market value rental from the date of the grant until May 25, 1984.

4/ We also note serious reservations about the appealability of a decision declining to amend the right-of-way on the facts of this case. The right-of-way issued for the width requested by applicant more than 30 days prior to filing of the application to amend. To the extent that appellant was adversely affected by the decision granting the right-of-way for the 10-foot width, an appeal should have been filed within 30 days of receipt. 43 CFR 4.411.

Section 504(a) of FLPMA specifically provides for the width of a right-of-way in the following fashion:

> The Secretary concerned shall specify the boundaries of each right-of-way as precisely as is practical. Each right-of-way shall be limited to the ground which the Secretary concerned determines (1) will be occupied by facilities which constitute the project for which the right-of-way is granted, issued, or renewed, (2) to be necessary for the operation or maintenance of the project, (3) to be necessary to protect the public safety, and (4) will do no unnecessary damage to the environment. The Secretary concerned may authorize the temporary use of such additional lands as he determines to be reasonably necessary for the construction, operation, maintenance, or termination of the project or a portion thereof, or for access thereto.

43 U.S.C. § 1764(a) (1982). When enacting FLPMA, Congress commented as follows on the Secretary's discretion to specify right-of-way boundaries:

> This subsection [section 504(a) of FLPMA] provides that the Secretary shall specify the boundaries of each right-of-way as precisely as is practicable. The Committee expects that the Secretary will exercise considerable flexibility in weighing the merits of each situation. * * *
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> Experience under existing Federal right-of-way laws demonstrates that the Secretary must have adequate discretion to determine both the extent and the conditions of the rights-of-way granted: For example, it will often be appropriate for the Secretary to determine that facilities constituting the project "occupy" additional space beyond the immediate physical limits of the structures themselves. In addition, a determination as to the boundaries and the amount of land necessary for operation and maintenance and protection of the environment and public safety should be made by the Secretary after a careful review of the proposed project or activity, the lands involved, the environment of the area, and other criteria set forth in this title.
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> The Committee intends that all rights-of-way granted under this title be limited to the minimum amount of land reasonably necessary for the conduct of the particular project or activity involved. The Committee further intends that all essential activities associated with the project or activity taking place within the right-of-way be appropriately authorized. The Committee has consciously avoided establishing arbitrary width limitations because experience has shown that they are not a practical guide to environmentally sound construction design; they are not amenable to technological change; and they limit the Secretary's discretion and ability to cope with unique circumstances. [Emphasis in original.]

S. Rep. No. 583, 94th Cong., 1st Sess. 70 (1975).

Clearly the Secretary is vested with broad discretion under the statute to determine the dimensions of a right-of-way grant. It is inconceivable that operation and maintenance of the telephone cable could be accomplished in the 1-inch corridor which appellant seeks by amendment of the right-of-way. Further, the fact that a public highway provides access to appellant's right-of-way is irrelevant. Right of passage over a public highway right-of-way does not authorize use of the public land therein for construction and maintenance of a telephone line. The record supports the decision denying appellant's application to amend the right-of-way and, accordingly, that decision is affirmed.

Finally, Beehive argues that a hearing pursuant to 5 U.S.C. § 554 (1982) is required. By its own terms, this statute "applies according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (1982) (emphasis added). We find nothing in Title V of FLPMA requiring a hearing in conjunction with issuance of a right-of-way, or the assessment of charges thereunder. 5/ Under 43 CFR 4.415, the Board is authorized within its discretion to refer any case for an evidentiary hearing. Generally, a hearing is appropriate only where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. Alumina Development Corporation of Utah, 77 IBLA 366, 371 (1983); KernCo Drilling Co., 71 IBLA 53, 56 (1983). We find that appellant has raised no issue of material fact and, thus, the request for a hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed in part, reversed in part, and remanded.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

James L. Burski
Administrative Judge

5/ This may be contrasted with provisions regarding termination of rights-of-way where notice and an opportunity for a hearing pursuant to 5 U.S.C. § 554 (1982) may be required. See 43 U.S.C. § 1766 (1982).